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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 20, 2002

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QUESTIONS PRESENTED

1. Are Federal Labor Relations Authority decisions denying unit consolidation subject to district court review where indirect review through unfair labor practice proceedings is "inadequa[te]," 5 U.S.C. § 703?

2. If not, are statutory interpretations announced in these decisions subject to district court review?

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CORPORATE DISCLOSURE STATEMENT

Petitioner Association of Civilian Technicians, Inc., (ACT) a labor organization, is a non-profit corporation. It has no parent company and has issued no stock.

OPINIONS AND ORDERS

The decision below is reported at 283 F.3d 339. The district court decision is not reported. The Federal Labor Relations Authority (FLRA) decision is reported at 55 FLRA 657. The FLRA Regional Director's decision is not reported.

JURISDICTION

The judgment sought to be reviewed was entered March 22, 2002. Rehearing was denied May 22, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATION

The statutes and regulation involved are 5 U.S.C. §§ 701-704, 706, 7103, 7112, 7114(c)(1), 7117(a), and 7123(a); 10 U.S.C. § 10503; 32 U.S.C. § 709; and Technician Program Regulation 250.1 ¶ 1-4e. Their pertinent text is set out in the appendix.

STATEMENT OF THE CASE

ACT filed with the FLRA a petition to consolidate the union's bargaining units into one unit. Because ACT's units comprise a nationwide majority of bargaining-unit-eligible National Guard technicians employed under 32 U.S.C. § 709, consolidation would by law afford technicians greater

bargaining rights.[1] The goal of the statute governing unit consolidation is to "ensure employees the fullest freedom in exercising the rights guaranteed under" the collective bargaining law. 5 U.S.C. § 7112(a).

The FLRA denied consolidation, saying the Technicians Act, 32 U.S.C. § 709, prohibits consolidation of units across state lines. The FLRA held: (1) the Act "command[s]" that each state Adjutant General have "authority over labor relations" with technicians in the state because otherwise the "statutory scheme is not workable," App. 38a, 40a; and (2) "the proposed consolidated unit would require a structuring of the National Guard inconsistent with the dictates of the Technician Act." App. 48a. The FLRA so held, despite its acknowledgement that "[t]here is no specific reference in the Technician Act to the allocation of labor relations authority." App. 39a.

The FLRA opinion also announced that increased bargaining rights is "not a factor" in determining whether units should be consolidated. App. 46a. The FLRA did not mention the statutory goal of "ensur[ing] employees the fullest freedom in exercising" collective bargaining rights. 5 U.S.C. § 7112(a).

FLRA decisions denying unit consolidation are subject to "indirect" judicial review through unfair labor practice

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[1] The union's current units may not negotiate the subjects of National Guard technician program regulations if there is a "compelling need" for the regulations. 5 U.S.C. § 7117(a)(2). This restriction would not apply to a consolidated unit comprising a nationwide majority of National Guard technicians. Under § 7117(a)(3), the consolidated unit's bargaining rights would "extend to matters which are the subject of" all agency regulations that apply to technicians, not just those regulations for which there is "no compelling need."

(ULP) proceedings. App. 6a. To obtain this review, a local ACT chapter representing a bargaining unit would have to (1) refuse to negotiate with management; (2) hope that an unfair labor practice charge is filed against the chapter; (3) if a charge is filed, argue that management must bargain with a consolidated unit; and (4) after the FLRA rejects the argument and sustains the charge, petition a court of appeals under 5 U.S.C. § 7123 to review the ULP finding and the consolidation denial on which it is based. App. 6a.

Rather than subject a bargaining unit to this ordeal, ACT filed suit in the district court, invoking that court's federal question jurisdiction. 28 U.S.C. § 1331. ACT argued that district court review of the FLRA decision is available because, under 5 U.S.C. §§ 703 and 704, indirect review through ULP proceedings is inadequate. Drawing an unfair labor practice complaint is not certain, and doing so requires that a sacrificial group of employees forego the benefits of collective bargaining throughout duplicative FLRA proceedings and lengthy appellate court review.[2]

ACT also argued that, even if the district court could not review the *decision* denying consolidation, it could review the two major statutory *interpretations* announced in the decision--namely, that (1) the Technicians Act bars unit consolidation across state lines, and (2) increased bargaining rights is "not a factor" in determining appropriateness of unit consolidation. ACT said that it had standing to seek review of the statutory interpretations, apart from its being aggrieved by the FLRA decision, because the decision does not bar ACT from filing a future consolidation petition; and

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[2] In the proceedings below, the FLRA did not deny that indirect review through ULP proceedings is inadequate, within the meaning of 5 U.S.C. §§ 703 and 704.

declaratory relief invalidating the interpretations would be a significant benefit to ACT's pursuit of a new petition.[3] The union argued it therefore could seek declaratory relief, just as if the interpretations had been announced in a regulation or published policy.

The court of appeals rejected ACT's arguments, holding, first, that 5 U.S.C. § 7123 impliedly precludes district court review of the FLRA decision, App. 4a-6a; and, second, that because review of the decision is precluded, review of legal interpretations is limited to constitutional claims. App. 8a.

ARGUMENT

The lower court's decision of the important questions presented conflicts with the precedents of this Court.

I

The court of appeals held district court review of the FLRA decision impliedly precluded by the text of 5 U.S.C. § 7123(a). This statute excludes unit consolidation decisions from the FLRA rulings directly reviewable by appellate petition. Under 5 U.S.C. §§ 703 and 704, however, mere exclusion from an appellate review statute is not "clear and convincing evidence" negating the presumption that district court review is available. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).[4]

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[3] The FLRA did not dispute ACT's standing arguments.

[4] Sections 703 and 704 preclude this inference, since the latter states, "[a]gency action made reviewable by statute *and* final agency action for which there is no other adequate remedy in a court are subject to judicial review" (emphasis added), and the former provides:

The court of appeals also relied on the legislative history, a sentence saying, "As in the private sector, there will be no judicial review of the Authority's determination of the appropriateness of bargaining units. H.R. Rep. No. 95-1717, at 153 (1978)." App. 5a. The court reasoned: "The Report does not say that there will be 'no circuit court review'; it says there will be 'no judicial review.'" *Id.* The court overlooked, however, that the statement in the Report is inaccurate. Unit determinations *are* subject to judicial review. They are subject, at least, to "indirect" review. An inaccurate sentence asserting "there will be no judicial review" is not clear and convincing evidence that, actually, there *will* be judicial review, but it will be *only* indirect circuit court review, not direct district court review.

The court of appeals also reasoned that the Report's reference to "the private sector" manifests congressional intent to embrace *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133 (1987) (*Local 23*), which, according to the court, held "that the National Labor Relations Act's preclusion of direct court of appeals review of certain matters also bars district court . . . review." App. 5a. This reasoning is unacceptable. A judicial decision in 1987 is not evidence of what Congress intended in 1978. And the *Local 23* Court did not hold--contrary to §§ 703 and 704 and *Abbott Laboratories*--that mere preclusion of direct appellate review also bars district court review. In *Local 23* the Court held that allowance of district court review of informal unfair labor practice

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The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute *or, in the absence or inadequacy thereof, any applicable form of legal action*, including actions for declaratory judgment or . . . mandatory injunction . . . in a court of competent jurisdiction. [Emphasis added.]

settlements would be absurd because Congress intended that there be *no* judicial review of these settlements. FLRA unit consolidation decisions, in contrast, *are* subject to review.[5]

The question presented is whether the availability of indirect appellate court review precludes direct district court review. This question is governed by precedents that the court below did not discuss: *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (under 5 U.S.C. § 704, available avenue of judicial review "will oust a district court of its normal jurisdiction" only if avenue is "special and adequate"), and *Block v. Community Nutrition Institute*, 467 U.S. 340, 348 (1984) (intent to preclude alternative avenue of review may be inferred if avenue "would severely disrupt [a] complex and delicate administrative scheme," including judicial review, that Congress expressly has provided).

Indirect review of FLRA unit consolidation decisions through ULP proceedings was not expressly provided by Congress and would not be disrupted by the availability of

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[5] The same point applies to the lower court's reliance on *Physicians National House Staff Ass'n v. Fanning*, 642 F.2d 492, 499 (D.C. Cir. 1980) (in banc). App. 6a. There, the legislative history expressly stated that individuals, and unions that would represent them, are entitled to *no* judicial review of National Labor Relations Board decisions deeming the individuals not to be employees covered by the statute (thus rendering ULP review "unlikely," since only an employer, acting contrary to its interest, could obtain such review). Contrary to the implication in the opinion below, App. 6a, the court in *Physicians National House Staff Ass'n* did not hold that "the union's . . . means of review was through an onerous unfair labor practice proceeding."

district court review.[6] Indirect review of FLRA decisions denying union requests for unit consolidation, moreover, is not "adequate" within the meaning of §§ 703 704, because a union cannot be certain that refusing to bargain will draw a charge, and refusing to bargain is prejudicial to the collective bargaining rights of the affected employees.

For the reasons stated above, the lower court's decision denying district court review of the FLRA's refusal to consolidate ACT's bargaining units is incompatible with the principles of *Bowen*, *Block*, and *Abbott Laboratories*.

II

The court of appeals also erred in holding that, where review of individual agency decisions is precluded, review of legal interpretations is limited to constitutional claims. App. 8a. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 483-84 (1991), the Court held that, where statutes deny review of agency decisions, district court review of agency procedures and standards governing those decisions is nonetheless available, and may consider statutory as well as constitutional claims.

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[6] This contrasts with the statute and legislative history expressly saying that Federal Service Impasses Panel (FSIP) decisions may be reviewed indirectly through ULP proceedings. *See Council of Prison Locals v. Brewer*, 735 F.2d 1497 (D.C. Cir. 1984). Limiting review of FSIP decisions to indirect ULP review is proper because ULP proceedings afford the only opportunity for the FLRA to decide the matter. Direct district court review of FSIP decisions would be disruptive because it would by-pass the FLRA entirely. The same is not true, however, of direct district court review of unit consolidation decisions. Indirect ULP review of unit consolidation decisions, moreover, is duplicative, because the FLRA decides the question twice.

The court of appeals acknowledged that the *McNary* principle applies where legal interpretations are announced in unreviewable agency decisions. App. 8a. *See Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994) ("general statement of policy" announced in agency decision can be reviewed even if agency decision, itself, may not); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 251 (D.C. Cir. 1986) (*Brock*) (same, because "an agency may choose to announce interpretations through adjudications rather than through rulemakings"). The court below, however, misunderstood this principle.

Contrary to the court's opinion, App. 7a, the reviewability of legal interpretations announced in unreviewable agency decisions is not an "exception[]" to this Court's rejection of "the principle that if the agency gives a reviewable reason for otherwise unreviewable action, the action becomes reviewable." *Id.* (*quoting Interstate Commerce Comm'n v. Brhd of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)). Review of a legal interpretation announced in an unreviewable agency decision simply does not involve--at all--review of the agency decision. The legal interpretation, not the decision in which it appears, is the "agency action" that is reviewed. *Brock*, 783 F.2d at 247-248. The interpretation is reviewed as if it had been announced in a regulation, a policy memorandum, or any of many "informal contexts such as letters." *Crowley Caribbean Transport*, 37 F.3d at 677.[7]

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[7] Since a reviewable legal interpretation "speak[s] to a broad class of parties," *id.*, standing to seek review of the interpretation does not depend on whether one was a party to the unreviewable decision in which the interpretation was announced. As where review of a regulation is sought, standing depends on whether the legal

Contrary to the lower court's opinion, App. 8a, neither of the the FLRA's two major statutory interpretations is "individualized." Both address "a broad class of parties." *Crowley Caribbean Transport*, 37 F.3d at 677. The first prohibits any union representing National Guard technicians from obtaining bargaining unit consolidation across state lines. The second applies in every case in which a proposed consolidated unit would represent a nationwide majority of employees who are subject to an agency's regulations. The appellate court erred when it held these statutory interpretations not reviewable under *McNary*, *Crowley Caribbean Transport*, and *Brock*.

III

Both statutory interpretations are erroneous. Contrary to the FLRA's opinion, the Technicians Act does not require that state adjutants general have "authority over labor relations." App. 38a. As the FLRA itself acknowledged, "[t]here is no specific reference in the Technician Act to the allocation of labor relations authority." App. 39a.

Under 5 U.S.C. § 7103(a)(3), the "agency" with which employees are entitled to bargain is the "Executive agency." The phrase "Executive agency" means an agency of the Executive Branch of the federal government. The federal Executive Branch "agency" here is the Department of Defense. The "head of the agency" empowered under 5 U.S.C. § 7114(c) to approve or disapprove collective bargaining agreements is the Secretary of Defense, who has

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interpretation impacts an ongoing (or perhaps imminent) legal relationship in a way that makes declaratory relief appropriate. *See, e.g.*, *Brock*, 783 F.2d at 246-47. Relief afforded if the interpretation is wrong is merely a declaration to that effect, not reversal, or compelled reconsideration, of the unreviewable decision.

delegated that authority to a Department of Defense official. Appellate Appendix at 12.

When adjutants general negotiate and execute collective bargaining agreements, they act as "duly authorized representatives" of the "agency." 5 U.S.C. § 7114(b)(2). There is no restriction on an agency's authority to determine its "duly authorized representatives" for purposes of collective bargaining. The collective bargaining law vests in the federal Executive Branch agency, the Department of Defense, unrestricted authority to control the agency's participation in collective bargaining.

In *Illinois National Guard v. Federal Labor Relations Authority*, 854 F.2d 1396, 1402 (D.C. Cir. 1988), the court noted, contrary to the FLRA's view, App. 46a, that authority to bargain with unions representing National Guard technicians is a prerogative of "*the Secretary* or those to whom he delegated his authority under the [Technicians] Act." (Emphasis added.) There is no requirement that the Secretary designate any adjutant general to be the Department's labor relations representative.

The Department of Defense, which is responsible for administering the Technicians Act, has not determined that the Act requires delegation to adjutants general of control over labor relations with technicians. As noted above, the Department has delegated "head of the agency" contract approval authority to a federal official, not to the adjutants general. Another important example of the federal control over labor relations is the Department policy requiring that all negotiability disputes and exceptions to arbitration awards be handled or approved by federal officials. Appellate Appendix at 13. Federal personnel located in the

Washington D.C. metropolitan area, not state-level personnel, handle negotiability appeals arising within the bargaining units. *Id.*

Federal officials have legal authority to control all aspects of technician employment that could be subject to collective bargaining. Under 32 U.S.C. § 709, adjutants general's employment of technicians is subject to "regulations prescribed by" federal officials. A National Guard Bureau regulation, TPR 250.1, ¶ 1-4 e states:

> The National Guard Bureau is headed by a Chief who is . . . responsible for exercising the authority that is delegated by the Secretaries concerned. This authority includes acting for the Secretary concerned with respect to administration of the technician program. . . . *This authority includes directing corrective action on any matter not found to be in accordance with applicable laws, rules, regulations, or NGB policy.* [Emphasis added.]

The authority described in this regulation is conferred by 10 U.S.C. § 10503(8) and (10), which state that the National Guard Bureau's duties include "[e]stablishing policies and programs for the employment and use of National Guard technicians under section 709 of title 32" and "[i]ssuing directives, regulations, and publications consistent with approved policies."

Under these legal standards, any condition of employment that technicians could negotiate through collective bargaining is a condition of employment that federal officials could prescribe by regulation or policy.

Federal control of collective bargaining therefore would not violate any legal prerogative of the adjutants general.[8]

The FLRA's second legal interpretation also is erroneous. Statutes must be interpreted and applied in ways that accomplish, not defeat, the statutes' goals. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984); *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) ("administrative constructions of the statute that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement" must be rejected).

The appropriate unit statute, 5 U.S.C. § 7112(a), expressly states that the goal of the statute is to "ensure employees *the fullest* freedom in exercising the *rights* guaranteed under" the collective bargaining law. (Emphasis added). Because the consolidated unit sought by ACT would, as a matter of law, provide employees increased legal rights to negotiate the subjects of National Guard regulations, see n. 1, *supra*, this factor is relevant to determining the appropriateness of consolidation.[9]

Under 5 U.S.C. § 7112(a) all National Guard technicians have a "community of interest" in negotiating the subjects of the regulations which affect their working conditions and apply to all of them uniformly. Footnote 9 of the FLRA's brief below agreed with the union that

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[8] The FLRA's brief below did not dispute any of our points regarding the authority of federal officials to control both labor relations with, and employment of, National Guard technicians.

[9] The district court noted (with understatement): "the Authority's [contrary] interpretation of 7112(a) . . . is not necessarily the best or most obvious one." App. 18a.

"application of the appropriate unit criteria in § 7112(a) itself," which include "community of interest," should be accomplished in a manner that "ensure[s] . . . "fullest freedom in exercising . . . rights," which include collective bargaining rights. See the union's opening brief below at 32-33. The error in the FLRA's brief was its failure to recognize that the FLRA had held just the opposite.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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